Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

The Lutheran Church/Missouri Synod	)	MM Docket No. 94-10
	)	
For Renewal of Licenses of Stations KFUO/KFUO-FM, Clayton, Missouri	)	File Nos. BR-890829VC BRH-890929VB

TO: Hon. Arthur Steinberg, Administrative Law Judge

REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE MISSOURI STATE CONFERENCE OF BRANCHES OF THE NAACP, THE ST. LOUIS BRANCH OF THE NAACP, AND THE ST. LOUIS COUNTY BRANCH OF THE NAACP

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INTRODUCTION

1. The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP (collectively "NAACP") respectfully submit their reply to the Findings of Fact and Conclusions of Law of The Lutheran Church-Missouri Synod ("KFUO") and the Mass Media Bureau ("Bureau").1/

I. REPLY TO KFUO FINDINGS OF FACT

2. **KFUO Findings ¶¶4-5 -- KFUO's framing of the issues.** If intended as a factual submission, these paragraphs are inappropriate as they contain no citations to the record. To some extent, they are meaningless. Even the most venal licensee says it "has the highest respect for the Commission...fully supports the need for honesty and candor...[and] any inaccuracies in the voluminous filings were purely unintentional." KFUO Findings ¶4.

3. **KFUO Findings ¶¶6-8 -- KFUO's "Mission".** These Findings are useful only as background, if at all.

4. A licensee's longevity is irrelevant in deciding whether it violated a Commission rule. 47 U.S.C. §304. There is only one exception: the Commission may look back into previous license terms to determine whether a licensee's claim of ignorance in a pattern of noncompliance in the license term under review is contradicted by

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1/ Where the NAACP believes that the Bureau erred in a finding or conclusion, and KFUO made the same error, the NAACP has not separately itemized the Bureau's error. The Bureau's errors were rare.

KFUO and the Bureau have organized their respective findings and conclusions somewhat differently from the way the NAACP organized its submission. Consequently, to assist the Presiding Judge, this Reply is organized according to the numbered paragraphs of KFUO's and the Bureau's filings.

the licensee's previous behavior. NBMC v. FCC, 775 F.2d 342 (D.C. Cir. 1985) (going back to previous license term to show that licensee had a longstanding pattern of EEO noncompliance.)

5. In the instant case, the NAACP's ability to develop evidence of KFUO's misconduct was limited to a review of the current license term. Thus, it would be unfair to allow KFUO to claim here that its pre-1983 EEO record was unblemished, since the record contains no comprehensive evidence of KFUO's pre-1983 EEO record.

6. Especially puzzling is KFUO's reliance on its status as the "world's oldest religious broadcast facility," and on its "religious format." KFUO Findings ¶7.[2/] KFUO cannot be heard simultaneously to argue that its format is at once entitled to special consideration[3/] as a mitigating factor and that it is entitled to a waiver of customary EEO standards because of its format. KFUO Findings ¶¶7-8.

7. **KFUO Findings ¶¶9-21 -- KFUO's history.** For the reasons stated above, virtually none of these proposed findings contain anything on which conclusions may be based. It may be stipulated that KFUO(AM) had a religious format.

8. **KFUO Findings ¶22 -- KFUO's past compliance record.** The claim that KFUO had not been cited for other violations in the past is supported by a citation to Church Ex. 7, p. 2. However, that citation is inadequate. A licensee relying on

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2/ Whether or not KFUO ever broadcast "Bach, Schuetz, Handel, Mendelssohn and others and related them to the Church year" has nothing whatsoever to do with this case. See KFUO Findings ¶8.

3/ Any such preference for KFUO's programming format can only be awarded to the comparative detriment of licensees with other formats. The Commission cannot do that without falling afoul of the Speech and Establishement clauses of the First Amendment.

its past regulatory compliance record -- for whatever period in the past -- should at least be expected to produce Commission documents proving the point. An agency cannot be expected to render findings about its own past rulings based by citing nothing more than the hearsay recollections of interested parties.

9. But it's almost irrelevant. A radio station with almost no minority employees for decades may have violated the civil rights laws with impunity for decades and nobody would know it. Indeed, that is perhaps the most common form of discrimination today. Thus, federal courts are careful not to reward civil rights defendants for what may well be their own cleverness in concealing previous violations.

10. **KFUO Findings ¶27 et seq. -- KFUO's Relationship With Concordia Seminary.** KFUO's contention that "[t]he relationship between the Stations and the Seminary has been well known to the Commission and to its predecessor agency" is unsupported by record evidence and not on point. The only "relationship" at issue in this case is KFUO's use of Concordia Seminary as the overwhelming source of choice for employees, given Concordia Seminary's almost total absence of African American students. That "relationship" was never disclosed to the Commission, which is why the issue was raised in the HDO.

11. **KFUO Findings ¶28 -- Concordia Seminary Student Population.** At n. 5, KFUO maintains that in the fall quarter of 1989, Concordia enrolled ten minority students out of 482. However, there were but three African American students. NAACP Ex. 30. This case relates to discrimination against African Americans, not "minorities." African Americans are by far the dominant minority group in the St. Louis market.

12. **KFUO Findings ¶33 -- Legal Enforceability of KFUO Relationship With Concordia Seminary.** At n. 6, KFUO either suggests or concedes that the relationship between the Stations and the Seminary "may not have been legally enforceable." Since the Stations and the Seminary are essentially subsidiaries of the ultimate licensee in this case, the legal enforceability of the arrangement, and whether it was in writing or not, are immaterial. If the arrangement were nonexistent but invoked as a defense, then it is a pretext for discrimination and KFUO's predesignation defense was a misrepresentation. But even if the KFUO/Concordia agreement were an ironclad written contract, KFUO's failure to take steps to counterbalance the obvious minority-exclusion embedded in the implementation of the agreement was discriminatory, and KFUO's failure to inform the FCC of the agreement renders its 1982 and 1989 EEO Programs misrepresentations. Either way, KFUO is guilty of both discrimination and misrepresentation.

13. **KFUO Findings ¶¶34-39 -- The Lutheran Church's Racial Policies.** Whether the Lutheran Church is religiously inclusive of minority groups is virtually irrelevant to the designated issues. For all we know, every other entity besides KFUO which is operated by the Lutheran Church practices nondiscrimination and aggressive affirmative action. But the issue in this case is whether the radio stations owned by the Lutheran Church violated the EEO Rule. Despite any multiculturalism practiced by other Lutheran Church subsidiaries, the radio stations operated as an enclave isolated from the rest of the denomination and doubly insulated by the specialized Board for Communication Services and the Board for Lutheran Radio. That insulation was so thorough that it allowed KFUO to use the virtually all-White Concordia Seminary as the

stations' primary recruitment source, while not using the Lutheran Church's own Commission on Black Ministry as a recruitment source. Tr. 718-20 (Testimony of Rev. Clancy).

14. **KFUO Findings ¶¶40-41 -- KFUO's Supposed Policy of Nondiscrimination**. KFUO asks the Court to find, as a fact, that "[t]hroughout the License Term, the Stations' personnel policies required employment on a racially non-discriminatory basis." KFUO Findings, ¶40. Yet position description after position description -- literally dozens of pages of documents updated repeatedly throughout the license term -- manifest a comprehensive policy of discrimination.4/ See NAACP Exs. 35, 36, 37, 39, 40 and 41 (discussed in the NAACP's Findings ¶29). Standing alone, a written document mouthing nondiscriminatory sentiments has no meaning. Indeed, if KFUO had not had some sort of written document claiming that KFUO does not discriminate, the absence of such a document would be evidence only of the licensee's ineptness.

15. **KFUO Findings ¶¶42 -- Effect of Absence of Complaints**. KFUO urges that the Court should infer from the absence of discrimination complaints that the Stations did not discriminate. No such inference is permissible, because the record does not show that the absence of discrimination complaints resulted from the absence of discrimination. Indeed, the record shows that the absence of discrimination complaints is a direct consequence of KFUO's deliberate concealment of its actual personnel policies. If

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4/ Indeed, it should not go without notice that KFUO's Findings contained no discussion of the principal smoking guns in this case -- the dozens of pages of openly discriminatory position descriptions. This curious and gaping omission only reveals the hollowness of KFUO's case. Imagine if O.J. Simpson's prosecutor possessed the murder weapon and matching blood evidence but failed to mention that fact at trial.

the Commission did not know KFUO's true policies, African Americans who were qualified for broadcast work surely could not have known them either.

16. A close analogy is found in environmental law. Like systematic discrimination, unlawful air or water pollution affects large numbers of people, who are unaware of these effects as they occur and, even if made aware, are usually not <u>each</u> so profoundly affected that they would be motivated to come forward and complain. Here, African Americans in St. Louis who were qualified for broadcast employment between 1983 and 1990 did not learn of available openings because KFUO's recruitment practices virtually assured that African Americans would never know of these openings. Is it surprising that these individuals did not come forward to complain? Not at all. First, their <u>individual</u> claims would be difficult to prove with the passage of time. Every such claim would be time barred under Title VII, barring any individual financial recovery. Furthermore, broadcasting is a small industry, and complaints against licensees often lead to blackballing of the complainant as a troublemaker. Thus, there would be no benefit whatsoever to a good samaritan to come forward and say (1) she would have applied for a particular job had it been made known to her in 1985; (2) she was qualified at the time; (3) she would have been hired had she applied; and (4) she only wants a declaratory order from the FCC saying that KFUO discriminated, even though she can receive no money and would be subjected to a gauntlet of discovery requests, time off from work, and personal risk for coming forward. Thus, although broadcasters are no more discrimination-pure as a group than other employers, there has been only <u>one</u> litigated discrimination complaint in the history of FCC broadcast EEO

enforcement since 1971.5/

17. The NAACP points this out to demonstrate that this Court cannot find as a fact, as KFUO requests, that "[t]he Stations' adherence" to a nondiscrimination policy "is evidenced" by the absence of complaints. KFUO Ex. 42. Indeed, the absence of complaints only signifies that KFUO successfully concealed its discriminatory practices -- an activity for which KFUO hardly deserves any reward.

18. **KFUO Findings ¶¶44-48 -- Witness Testimony Concerning Supposed Nondiscriminatory Policies**. All of this testimony must be rejected, for three reasons. First, Messrs. Stortz, Lauher and Devantier were the culprits in implementing discriminatory policies. Thus, it is unsurprising that they would testify that there was no discrimination. Second, Rev. Bohlmann and Rev. Clancy had no knowledge of the Stations' operations, and thus were not in a position to testify with authority on this subject.6/ Third, the credentials of each witness to make the particular statements he made were not provided for the record. KFUO provided no evidence that any of its witnesses has any training which would

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5/ That case, Catoctin Broadcasting Corp. of New York, 4 FCC Rcd 2553 (1989), recon denied, 4 FCC Rcd 6312 (1989), aff'd per curiam by Memorandum, No. 89-1552 (released December 18, 1990) ("Catoctin") involved a licensee whose open and repeated expression of discriminatory sentiments illuminated his status as one of broadcasting's lesser intellectual lights.

6/ Unlike Rev. Clancy, it was Rev. Bohlmann who was obligated as a fiduciary to be informed about KFUO's practices. Instead, he relied entirely on subordinates, requiring no reports and resting only on their reputations. Rev. Bohlmann's behavior is even worse than that of the university officials in Trustees of the University of Pennsylvania, 69 FCC2d 1394 (1978). Like the Trustees, who failed to stay informed regarding the operations of the university's radio station, Rev. Bohlmann relied upon and deferred entirely to KFUO's employees and agents.

enable him to recognize the often-subtle practice of race discrimination if he saw it.7/ This includes Rev. Clancy, whose race did not endow him at birth with special powers of observation.

19. **KFUO Findings ¶¶50 -- Religious Requirement for Announcing Positions**. KFUO maintains that "[a]lmost all of the seminary students" it hired filled announcing positions requiring knowledge of the Lutheran doctrine. KFUO Findings ¶8. The record shows otherwise. Of 25 seminary students hired, eight did not work in announcing positions, including four fulltime employees (an Assistant to the Business Manager, a receptionist and two secretaries) as well as a technician, production assistant, receptionist and secretary, each parttime. Moreover, KFUO has presented no evidence showing that it allowed Lutherans who were not seminary students, such as Black Lutherans, to compete for these positions. Indeed, of the 25 positions for which seminary students were hired, all of them were hired without competition from other candidates or advertising for other positions. See KFUO Ex. 4, Tab 6. Thus, KFUO actually insulated the seminary students in an essentially all-white Lutheran set-aside, exempting these positions from equal employment opportunity compliance. That is not protected religious activity.

20. **KFUO Findings ¶¶51-53 -- Religious Requirements for Receptionists and Secretaries**. Although some secretaries

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7/ KFUO could have chosen to provide the full record in this case, including KFUO's FCC filings, its position descriptions, and the Concordia documents, to a retained expert witness who could have provided an opinion about them. A defendant in a civil rights case almost always does this; indeed, this is the only major civil rights trial in years in which any unit of the NAACP has participated in which the defendant or party-respondent did not produce an expert. KFUO, a sophisticated employer, must live with the record it deliberately created.

and receptionists may have performed religious duties, KFUO made no attempt to show that they all did, or even that most of them did. The fact that one or two secretaries or receptionists, at a religious station, might on occasion have performed a religious function does not exempt the entire secretarial and receptionist staff of that station from the EEO requirements. It certainly does not exempt secretaries and receptionists at the FM station. That station had a secular format and sold commercial advertising, and carried no more (and quite likely less) religious programming than any other secular station would have carried.

21. **KFUO Findings ¶¶54 -- Religious "Qualifications" Unstated in EEO Programs**. KFUO relies on Dennis Stortz' opinion that the public would understand the religious qualifications for employment at the stations because the licensee is a church. Yet KFUO itself could not clearly identify which types of religious attributes -- training, affiliation, church attendance -- were really qualifications for which job. KFUO used the terms "knowledge of Church doctrine" as a "qualification" for the first time -- in its Findings. KFUO Findings ¶54; see also reference to "knowledge of Church principles" in KFUO Findings ¶61, another undefined term also used there apparently for the first time. KFUO's position descriptions variously used terms such as "an active member of a Christian Congregation" (NAACP Ex. 40); "understanding and support of the purposes, constitution, by-laws, policies and beliefs of The Lutheran Church/Missouri Synod" (NAACP Ex. 41); "member of a Lutheran Church/Missouri Synod Congregation" (id.); "familiarity with all areas of the Synod, its structure and organization" (NAACP Ex. 37); "an active member of a Christian Congregation, able to understand and demonstrate support for the purposes of The Lutheran

Church/Missouri Synod" (NAACP Ex. 39). With so many internal and distinct qualifying tests, how could KFUO assume that the Commission and the public can guess at which ones apply to which positions?

22. Mr. Stortz also supposedly believed that it was unnecessary to apprise the Commission of the seminary set-asides because KFUO had been licensed to the Seminary two generations ago. KFUO Findings, ¶54. Mr. Stortz, a broadcaster for two decades, must be presumed to be sufficiently familiar with the FCC to know that when it renews a license, it does not trace a licensee's ownership back some 50 years to draw inferences about the licensee's current EEO bonafides. KFUO's reliance on Mr. Stortz' written testimony on this point unfortunately confirms that this licensee will say virtually anything to secure a federal benefit.

23. **KFUO Findings ¶¶55 -- Marcia Cranberg's Part in KFUO's License Renewal Applications**. KFUO attributes the absence of any mention of religious qualifications in the EEO programs to Ms. Cranberg's failure to "focus on the fact that KFUO(AM) had a religious program format." Yet KFUO has simultaneously requested a finding that the Commission should have focused on that fact -- indeed, that it should have focused on the station's history dating back to a generation before Ms. Cranberg was born. KFUO Findings ¶54. Actually, Ms. Cranberg was well aware of the station's format. Recall that on April 4, 1989, she wrote KFUO a long letter about the King's Garden case. KFUO Ex. 8, Attchment 6. Thus, KFUO's reliance on her failure to "focus" on this point is troubling. That may have been Ms. Cranberg's testimony, but it is inherently unreliable, even bizarre. KFUO should never have embraced that testimony in its Findings.

24. Thus, this Court should find that (1) the Commission should not have had to focus on KFUO's format and history, because it's obviously not the Commission's job to keep track of these things; and (2) Ms. Cranberg did focus on these things.

25. **KFUO Findings ¶¶56, 89-90 -- Statistical Hiring Record of KFUO**. KFUO's statistics are deeply flawed and unreliable. They do not include parttime hires, which were all-white; they do not distinguish between the top four category and ministerial positions; and they do not distinguish between African Americans and other minorities. The bottom line statistic which matters is that KFUO never recruited, considered, or hired any African American for a position other than secretary or janitor during the license term. No massaging of the numbers can obscure this fundamental fact.

26. **KFUO Findings ¶¶57, 67 -- Financial Impairment**. A plea of poverty coming from one of the largest and most successful religious denominations in the world is incredible. Moreover, even the financial records KFUO has relied on show considerable financial ability and strength relative to the very slight expense which would have attended mailing out job notices to minority sources. Tr. 486-87 (Testimony of Dennis Stortz that KFUO could have afforded the postage stamps.)

27. **KFUO Findings ¶57 -- "Informal Means" of Seeking Minorities**. KFUO defends its use of "informal means" (such as the use of employee recommendations) to attract minorities by noting that the NAACP's witness, Richard Miller, also used some such means as part of his station's EEO program. KFUO Findings n. 14. However, context is everything, and KFUO has taken this practice by Mr. Miller far out of context. Mr. Miller's station, unlike KFUO,

used both formal and informal recruiting for the majority of positions, albeit not all of them. Furthermore, Mr. Miller's overall efforts were generally rather successful. Obviously, an employer who solicits job candidate recommendations from an integrated staff can rely more reasonably on employee recommendations than one who uses them to perpetuate an all-white staff.

28. Mr. Miller did not conceal any discriminatory job requirements from the Commission, either.

29. Mr. Miller's experience shows that a licensee does not have to behave perfectly in EEO to get its licenses renewed. Yet any minor mistakes he may have made must not be seized upon as evidence that those mistakes are acceptable when another licensee adopts them and includes them in its massive pattern of discrimination and misrepresentation.

30. **KFUO Findings ¶¶59, 64 -- Treatment of African American Employees.** KFUO's evidentiary showing on this point was very weak. It presented no written documentation to support its claim that it considered Ruth Clerkly "for a management level position[.]" See KFUO Findings n. 15. Nor did KFUO show that Ms. Clerkly herself was unavailable to it as a witness. KFUO's claim that Lula Daniels was "part of a network of congregations and Lutherans" who notify KFUO for job openings was not only unsupported by any written document, it was unsupported by the oral testimony of a person having personal knowledge of the existence of any such "network." It is too facile to make a bald claim about a deceased person's membership in a "network."

31. KFUO claims that "[t]here is no evidence that the African American employees who left the station were discrimination victims. KFUO Findings ¶64. These witnesses did not testify. Therefore, no inference may be drawn on this subject. The record does not show that these women would have known -- any more than the FCC knew -- that KFUO had any hidden job "requirements" whose intent and effect was to limit the advancement of African Americans.

32. **KFUO Findings ¶¶61-63, 68 and ns. 19, 20 and 24 -- Use of Referral Sources.** KFUO's account of its use of referral sources omits the fact that these sources were used very rarely. Thus, KFUO's reliance on the fact that Richard Miller spoke well of these sources was inappropriate, since Mr. Miller used them often.

33. **KFUO Findings ¶¶65-66 -- Communications from Arnold & Porter.** KFUO claims that the EEO letters sent by Arnold and Porter were part of "scores if not hundreds of letters over the years notifying Arnold & Porter's clients of regulatory developments at the Commission." KFUO Findings n. 21. KFUO relied for this claim on KFUO Exhibit 8, pp. 2-3. However, that exhibit does not support the suggestion that there were "scores if not hundreds" of other letters, nor does it support the implication that KFUO could be excused for overlooking Arnold & Porter's repeated EEO compliance warnings because they were buried in an avalanche of other paper. Recall that KFUO paid for that avalanche of paper. Tr. 550 (Testimony of Dennis Stortz).

34. KFUO also seeks a finding crediting Mr. Stortz' testimony that Arnold & Porter's letters could not reasonably have alerted the stations "to any particular deficiency." KFUO Findings ¶66. Embedded within that proposed finding is the assumption that Arnold & Porter was told of KFUO's actual employment practices, and were

thus in a position to advise the stations about them. KFUO presented no evidence that it ever levelled with its own attorneys about its EEO practices. Indeed, Reed Miller and Ms. Cranberg testified that they never saw KFUO's dozens of smoking gun job descriptions. It is little wonder, then, that they did not write KFUO more specific letters. Nonetheless, even a cursory review of the letters they did write should compel the conclusion that any recipient of those letters would have known that it was not supposed to discriminate.

35. **KFUO Findings ¶¶70 -- "Reexamination" of EEO Compliance in 1988**. KFUO seeks a finding that after Mr. Lauher attended the Missouri Broadcasters Association meeting in the fall of 1988, "KFUO began a broad re-examination of its outreach efforts and its general compliance with the Commission's EEO requirements." The record shows only that Mr. Lauher, not KFUO, began such a "re-examination," that he was motivated only by the need for license renewal insurance, that Rev. Devantier ignored all of Mr. Lauher's advice, and that KFUO did not implement any of Mr. Lauher's advice in practice until after the NAACP filed its Petition to Deny. Even then, KFUO's "implementation" of Mr. Lauher's advice was limited to the hiring of a receptionist and janitor in the last two days of the license term, an effort which was cynically abandoned when the time came to recruit for more significant positions. Bureau Ex. 6, p. 5; NAACP Ex. 10.

36. **KFUO Findings ¶¶84-85, 91 -- EEO "Forms"**. KFUO did a one-shot, 11th hour mailing which it claims sought candidates for "all openings." KFUO Findings ¶84. KFUO did not mention that the letters did not identify any openings, but did promise subsequent notices of openings -- a promise KFUO did not keep.

37. KFUO also maintains that "[t]hereafter, in part because of turnover in managerial personnel in the summer of 1989, the EEO forms were not consistently used during the remainder of that year." KFUO Findings ¶85. That is not correct. There was no such "turnover", since Rev. Devantier and Mr. Stortz were employed as the stations' senior managers throughout the relevant time period. KFUO's use of the word "consistently" is misleading. The truth is that after Mr. Lauher sent these forms out, they were never used again. Nonetheless, KFUO allowed these one-shot letters to go into the license renewal applications as a "sample." KFUO never amended the applications to show that it had actually used them only once. See KFUO Findings ¶91.

38. **KFUO Findings ¶¶88 -- The NAACP Petition to Deny**. KFUO offers the proposed finding that by January, 1990 "the Stations had begun to recruit more vigorously and had also received the NAACP's petition to deny." That finding is patently misleading, for KFUO has identified no event other than the Petition to Deny which prompted it to begun to "recruit more vigorously" (more accurately, to select two minor positions to be given to African Americans, then return to business as usual.) The Commission should not have to rely on the constant filing of petitions to deny to insure that licensees obey the law.

39. **KFUO Findings ¶¶88 -- Discriminatory Tests of Candidates**. The NAACP had alleged that it only performed written tests on the attributes of candidates for the two post-Petition to Deny positions intended for minorities. KFUO's only defense was that the person who did these tests, Angela Burger, "had not done job interviews for the Stations prior to January 1990." KFUO

Findings n. 31. That is no defense at all. Imagine a police brutality complaint defended only on the basis that the officer had not previously been given a nightstick. KFUO does not deny that it make the conscious choice to apply a written testing requirement, for the first time, for the two jobs for which it sought to hire African Americans on an emergency basis.

40. **KFUO Findings ¶¶92-108 -- Classical Music Requirements.** KFUO's Findings utterly fail to explain (1) why most of its white salespersons had no classical music experience; (2) why it failed to recruit in places in which it would probably find applicants who had classical music experience; and (3) why it failed to recruit any African Americans for KFUO-FM positions, including sales positions, even though African Americans are obviously no more intrinsically inclined for or against working in a classical environment than are members of other races.

41. KFUO maintains that its lawyers relied on Franklin Broadcasting Co., 57 FCC2d 130 (1975) ("Franklin") for their opinion that a classical music requirement was appropriate. KFUO Findings ¶103. However, there was no mention in Franklin that WFLN-FM did not actually apply its supposed requirement, or that in applying it, it applied it in a discriminatory manner. As KFUO admits, Franklin was silent on whether such a requirement could be discriminatory.

42. **KFUO Findings ¶¶109-127 -- Misrepresentations.** The NAACP has no adverse comment on the matters involving Paula Zika, and only objects to the last phrase of the last sentence of KFUO Findings, ¶127 (claiming lack of intent to deceive on "any other matters.")

II. REPLY TO BUREAU FINDINGS OF FACT

43. **Bureau Findings ¶51 -- Rejection of Minority Applicants**. The Bureau cites Mr. Stortz' testimony that no minority applicant was ever rejected for lack of classical music knowledge. This testimony was a non-sequitur. Since KFUO was so successful in keeping African Americans unaware of job openings as they arose, not one African American applied for any top four category positions during the license term.

III. REPLY TO KFUO CONCLUSIONS OF LAW

44. **KFUO Conclusions ¶¶130-147 -- Religious Accommodation**. KFUO's argument relies primarily on Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos"). KFUO argues here that Amos essentially has overruled King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert denied, 419 U.S. 996 (1974) ("King's Garden").

45. It is too late for any such argument, for KFUO has waived it. Below, KFUO relied on King's Garden and attempted with great passion to defend its policies based on their compliance with King's Garden. See Motion to Strike and Reply to Comments, September 21, 1992, Bureau Ex. 11, p. 19; Reply to FCC Letter of Inquiry, December 28, 1992, Bureau Ex. 14, p. 37.

46. Even if the Court considers KFUO's argument, that argument must be rejected on the merits. First, it is simply not the case that as to religion, "the Commission's EEO requirements are far more specific and expansive now than they were in 1974" as claimed by KFUO. KFUO Conclusions ¶136. The EEO Rule as originally adopted in 1969 prohibited religious discrimination. Nondiscrimination in Broadcasting, 18 FCC2d 240, 245 (1969).

47. The Court may make short work of KFUO's argument that Amos overruled King's Garden, for that argument is based on a faulty assumption. KFUO assumes that the King's Garden court relied decisionally on the premise that Title VII's exemption of all activities of religious entities from the 1964 Civil Rights Act's ban on discrimination in employment violated the Establishment Clause. That is not correct. The King's Garden court simply affirmed the Commission's election not to apply such an overbroad exemption to its enforcement of the EEO Rule. The Commission made this election because the purposes of the EEO Rule are broader than those of Title VII, in that they include both the exclusion of licensees of bad character from broadcasting[8/] and the promotion of diversity.[9/]

48. Thus, the fact that the Civil Rights Act's exemption was held constitutional in Amos adds nothing to FCC jurisprudence. The fact that a statute is constitutional only permits, but does not compel its adoption or application. And the constitutionality of a statute hardly compels an agency to adopt a regulation implementing an entirely different statute -- in this case, the Communications Act.

49. Consequently, the FCC continues to be on solid constitutional ground in enforcing the EEO Rule's prohibition on religious discrimination by religious broadcasters, so long as that prohibition is narrowly tailored to the government's legitimate interests in maintaining the good character of its licensees and

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8/ Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977).

9/ NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976).

promoting diversity in broadcasting. Here, the "narrowly tailored" requirement is met, because every party in this case accepts that KFUO may exempt from the nondiscrimination requirement such positions as general manager, program manager and AM announcer which involve religious-related duties.

50. KFUO cites Amos, 483 U.S. at 336, for the proposition that it could burden a religious organization "to predict which of its activities a secular court will consider religious." KFUO Conclusions ¶139. However, there is not a shred of evidence suggesting that during the license term, KFUO actually felt any such burdens.10/ Instead, KFUO routinely prepared and revised dozens of position descriptions containing arbitrary and often facially absurd religious requirements for jobs (including jobs at the FM station) having nothing whatsoever to do with religion. KFUO had counsel, with whom it would normally consult if it felt burdened by a legal requirement construed by the Supreme Court. But that attorney claims not even to have "focused" on KFUO(AM)'s format when she prepared KFUO's license renewal applications. See KFUO Findings ¶55. That is not the behavior of counsel for a "burdened" party.

51. If KFUO had really felt "burdened," it would have been honest and open about its requirements and any "burden" it felt. It would have disclosed its requirements in its license renewal applications and in its responses to Commission inquiries, rather

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10/ In a footnote, KFUO admits that Justice Brennan's fear of a burden was focused on nonprofit institutions. KFUO Conclusions n. 43. KFUO then attempts to imbue KFUO-FM with the "nonprofit" mantle by virtue of the fact that it "operated at a deficit" and thus was operated "for nonprofit purposes." KFUO never claims, though, that it did not try to make a profit from KFUO-FM. Indeed, KFUO's Findings argue at great length that its invocation of faux "classical" requirements expressly derived from its zeal to operate KFUO-FM profitably. See KFUO Findings ¶¶92-98.

than waiting for discovery to disclose the existence of its position descriptions which contained a plethora of discriminatory requirements. Alternatively, it would have asked the Commission for a declaratory ruling on whether its various religious requirements were permissible. Finally, when asked about theological requirements in the Commission's predesignation Bilingual inquiries, it would have asked for a threshold constitutional ruling.

52. KFUO failed to take any of these fundamental steps. This shows that KFUO's argument about religious burdens is nothing more than the clever concoction of new counsel, and not a valid expression of any feeling KFUO may have had during the license term. What we have here, instead, is a run of the mill case of concealment and avoidance.

53. Since Amos does not change the Commission's law, KFUO's argument that the Commission should apply post-Amos standards "prospectively only" is irrelevant. See KFUO Conclusions ¶144.

54. KFUO cannot claim now that it was justified in failing to recruit from "secular sources" on the theory that such recruitment was protected by Amos. See KFUO Conclusions ¶145. As shown above, it wasn't. But even if it were, KFUO is precluded from making this claim because at no time, until now, has KFUO maintained that it failed to use "secular" sources because it only intended to hire Lutherans. Indeed, KFUO did use "secular" sources on occasion, although it did not notify them of any intention only to consider or hire Lutherans.

55. KFUO acknowledges that there are many Black Lutherans. KFUO Conclusions ¶146. Thus, it is quite revealing of KFUO's actual intent that it failed to use African American Lutheran churches, or the Lutheran Church's own Commission on Black Ministry for job

referrals. KFUO is simply hiding its intent to discriminate on the basis of race behind the thin shield of religion.

56. The rights of citizens to earn a living is important and deserving of protection. KFUO's religious freedom is also an important concern worthy of protection, but KFUO's conduct was anything but sacred in content or motivation. Its conduct is not protected.

57. **KFUO Conclusions ¶148 -- Effect of the Passage of Time**. As a justification for renewal, KFUO cites the fact that the license term began eleven years ago. If KFUO had clearly disclosed the true nature of its job qualifications in its 1982 renewal applications, the Commission could have passed on the propriety of these qualifications at that time, and provided KFUO with guidance on how to comply with the rules. KFUO could then have complied or brought a principled challenge to the rules in court. Instead, KFUO concealed and avoided. When faced with a Bilingual investigation, KFUO avoided direct and complete answers, compelling the EEO Branch to write to KFUO four times to elicit the whole truth. Thus, it is KFUO's own concealment and deception which caused this delay.

58. **KFUO Conclusions ¶149-151 -- Supposed "New" EEO Standards**. KFUO argues that Broadcast EEO, 2 FCC Rcd 3967 (1987), manifested a new "emphasis on documentation" which had not arisen previously and thus could not be applied retroactively. KFUO also maintains that its EEO Guidelines, 46 RR2d 1693, recon. denied, 79 FCC2d 922 (1980) allowed broadcasters "free to craft their own approach to affirmative action as long as they could demonstrate that minority hires resulted."

59. KFUO's objection to Broadcast EEO comes at least five years too late. KFUO filed its renewal applications in 1989 without objecting to their consideration under Broadcast EEO. Nor did KFUO challenge Broadcast EEO in opposing the Petition to Deny. Moreover, at trial, KFUO failed to seek an instruction limiting testimony to the post-1987 period only. Indeed, KFUO eagerly opened up the entire license term to scrutiny, arguing that its pre-1985 record of employing a few lower level African Americans helps mitigate its even worse post-1985 record. See KFUO Findings ¶¶58-60. Thus, KFUO has waived its right to argue lack of notice or retroactivity.

60. Furthermore, KFUO's argument seriously rewrites history. The EEO documentation requirements were always preeminent. Statistics could never substitute for procedures, which is why the EEO guidelines are not quotas. Opinion of the General Counsel/EEO Rules, 44 RR2d 907, 909 (Gen. Counsel 1978).

61. The only material change in EEO jurisprudence derived from Broadcast EEO ruling was the incorporation of Form 396 guidelines in the EEO Rule itself. At most, that represented a new "emphasis" on documentation, using KFUO's terminology. KFUO Conclusions ¶151. But an agency's modest shift in "emphasis" does not immunize licensees from compliance review. A clarifying ruling which only shifts emphasis without creating material new substantive rules "merely [makes] explicit what was readily inferable from the earlier rulings." Marin TV Services Partners, Ltd. v. FCC, 993 F.2d 261, 263-64 (D.C. Cir. 1993). Thus, KFUO was always on notice of the basic substantive EEO requirements it is accused of violating here.

62. KFUO is correct in noting that EEO penalties changed when forfeitures began to be employed in 1987. But these forfeitures had long been authorized by statute and by the Commission's rules. The Fowler Commission simply never found a broadcaster whose EEO record it did not like, and it never imposed any forfeitures.11/

63. **KFUO Conclusions ¶¶174-175 -- Nondiscrimination.** KFUO infers nondiscrimination from the lack of proof of discrimination. But KFUO had the burden of proof, not the NAACP or the Bureau. KFUO failed to meet this burden by proving that there was any legitimate, nondiscriminatory basis for its many acts and omissions -- such as its extensive position descriptions, the Concordia arrangement, and its failure to recruit for employees in a manner even approaching what was normal in the broadcast industry -- which prevented African Americans (and, in many cases, non-Lutherans) from learning of job openings and being considered for employment.

11/ In any event, since KFUO's conduct requires denial of renewal, questions about forfeitures are of little import here. Thus, the NAACP finds it inappropriate and unnecessary to comment on KFUO Conclusions ¶¶155-172. However, the NAACP expressly preserves for appeal its contention that the forfeiture policies adopted in 1994 may be applied to KFUO's conduct, since KFUO should always have been on notice that its conduct was unlawful.

For our present purposes, the NAACP observes that forfeitures are again being levied by the Commission by comparing licensees' conduct with that of similarly situated licensees -- the same procedure followed before February 1, 1994. Since KFUO's conduct is sui generis and in extremis compared with other licensees, the Presiding Judge is free to chart his own course.

Even if KFUO's retroactivity argument is credited, the Court should take note that much of KFUO's offensive conduct occurred well after the Commission began issuing EEO forfeitures in 1987.